PD-0799-19
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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No. PD-0799-19

IN THE
TEXAS COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
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**THE STATE OF TEXAS,
PETITIONER,**

v.

**SHEILA JO HARDIN,
RESPONDENT.**

ON PDR FROM THE THIRTEENTH COURT
OF APPEALS

PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF

Douglas K. Norman
State Bar No. 15078900
Assistant District Attorney
105th Judicial District of Texas
901 Leopard, Room 206
Corpus Christi, Texas 78401
(361) 888-0410
(361) 888-0399 (fax)
douglas.norman@nuecesco.com

Attorney for Petitioner

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SHEILA JO HARDIN,		
Respondent.	**OF TEXAS**

PETITIONER'S RESPONSE TO RESPONSDENT'S BRIEF

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

As one of her primary arguments in reply to the State's brief, Hardin suggests that the presumption that legislative inaction implies legislative approval of longstanding judicial interpretation should be extended to situations in which only the intermediate courts of appeals have spoken on the issue in question. (Respondent's Brief, p. 8) However, although not all of its opinions have been careful to define or limit what they mean by "judicial interpretation," an early Texas opinion which discussed the presumption in depth and on which the present opinions are based, did suggest that it was limited to circumstances in which the court of last resort had spoken:

> In the case of Supreme Council A.L.H. v. Anderson, 36 Tex.Civ.App. 615, 83 S.W. 207, there is this apt statement of the rule: "And it is a familiar rule that when the Legislature adopts a statute in force in another state, or re-enacts a statute formerly in force in the particular state, it will be presumed that the construction formerly placed upon the statute by the *court of last resort* was known to the Legislature, and that in re-enacting the statute it was the legislative intent that it should have the meaning so placed upon it by the courts." Indeed, the rule is so thoroughly settled, not

> only in this state, but in practically every court of last resort throughout the country, and has so universally and unqualifiedly received the sanction and approval of the most eminent text-writers, as to admit of neither doubt nor difficulty. If it could be claimed that the application of this rule may be doubted in this case, for the reason that our Supreme Court had in Ex parte Dupree, supra, expressed an opinion at variance with the settled holding of this court, the reply is evident and conclusive that it must have been understood by and known to the Legislature that this statute would and must be construed by this court, and that in the nature of things it could never receive construction by our Supreme Court.

Lewis v. State, 58 Tex. Crim. 351, 363, 127 S.W. 808, 813 (1910) (emphasis added). Likewise, the Supreme Court of Texas has stated the rule to be that, "If an ambiguous statute that has been interpreted by a *court of last resort* or given a longstanding construction by a proper administrative officer is re-enacted without substantial change, the Legislature is presumed to have been familiar with that interpretation and to have adopted it." *Texas Dept. of Protective & Regulatory Services v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176 (Tex. 2004) (emphasis added).

To extend this rule of statutory interpretation in the manner suggested by Hardin would endow intermediate courts of appeals with a power well beyond their intended boundaries and blur the distinction between settled law in Texas and issues that remain in flux and unresolved by the highest courts. Only when this Court has already rendered a certain opinion, binding throughout the State, should the ball then be considered punted to the legislature to either accept that interpretation by their silence or change it by legislative action. To hold

otherwise would effectively give intermediate courts of appeals the power to bind this Court to their interpretation, merely by virtue of the fact that this Court has not seen fit to resolve the issue for a significant period of time.

PRAYER FOR RELIEF

For the foregoing reasons, the State requests that this Court reverse the judgment of the Thirteenth Court of Appeals and remand to that Court for proceedings consistent with the opinion.

Respectfully submitted,

/s/ *Douglas K. Norman*

Douglas K. Norman
State Bar No. 15078900
Assistant District Attorney
105th Judicial District of Texas
901 Leopard, Room 206
Corpus Christi, Texas 78401
(361) 888-0410
(361) 888-0399 (fax)
douglas.norman@nuecesco.com

RULE 9.4 (i) CERTIFICATION

In compliance with Texas Rule of Appellate Procedure 9.4(i)(3), I certify that the number of words in this response, excluding those matters listed in Rule 9.4(i)(1), is 605.

/s/ *Douglas K. Norman*

Douglas K. Norman

CERTIFICATE OF SERVICE

This is to certify that, pursuant to Tex. R. App. P. 6.3 (a), copies of this response were e-served on November 5, 2019, on Respondent's attorney, Mr. Donald B. Edwards, at mxlplk@swbell.net**,** and on the State Prosecuting Attorney, at Stacey.Goldstein@SPA.texas.gov.

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/s/ *Douglas K. Norman*

Douglas K. Norman